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00-969

(1)

No. 00-

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this espionage case, petitioners Theresa Squillacote and her husband Kurt Stand were subjected to 550 consecutive days of round-the-clock telephonic and physical surveillance, purportedly under the auspices of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801, *et seq.* In the course of that surveillance, the government intercepted and transcribed several of Squillacote's sessions with her psychotherapists, and later apparently used that information to design an undercover operation tailored, by its explicit terms, to "exploit" her psychiatric vulnerabilities. Pet. App. 115a. The court of appeals concluded that the government had made a sufficient showing to warrant the FISA surveillance without, however, affording defense counsel any opportunity even to examine, much less effectively challenge, the government's submissions in support of FISA authority. The court also sustained the trial court's refusal to hold a hearing regarding whether, and to what extent, the government had made derivative use of privileged psychotherapist-patient communications it obtained during the FISA surveillance. And the court held that, for purposes of the espionage statutes, it makes no difference that the "information" provided by the defendant is wholly in the public domain, so long as it was not the *government itself* that originally disseminated that information to the public.

The following three questions are presented:

1. Whether, in agreement with the Ninth and Tenth Circuits but in conflict with the Second, Third, and Seventh Circuits, the court of appeals correctly held that the government, having intercepted communications protected by a common-law, non-constitutional privilege, is entitled to make derivative use of those communications.

2. Whether, for purposes of the espionage statutes, information that is in the public domain nevertheless "relates to the national defense" because the government did not itself release the information to the public.

3. Whether the court of appeals erred in sustaining the FISA surveillance in this case, without affording defense counsel, pursuant to 50 U.S.C. §§ 1806(f) and 1825(g), an opportunity even to see the applications on the basis of which the surveillance was ordered.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Theresa Marie Squillacote and Kurt Alan Stand respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 221 F.3d 542. The order of the court of appeals denying rehearing (Pet. App. 67a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A timely petition for rehearing was denied on September 8, 2000. Pet. App. 67a-68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case, 18 U.S.C. §§ 793, 794 and 50 U.S.C. §§ 1801-1829, are set forth in pertinent part in the Appendix. Pet. App. 69a-107a.

STATEMENT

Even for espionage cases, the government's investigation and prosecution of petitioners Theresa Squillacote and Kurt Stand is astonishing. For starters, virtually all of the government's evidence was derived from 550 days of electronic surveillance (and several secret physical searches) conducted under the purported auspices of the Foreign Intelligence Surveillance Act ("FISA"). Yet to this very day, petitioners — although having the statutory right to challenge the basis for the surveillance and searches — have never seen the applications that the government submitted to receive authorization to tap petitioners' phones, bug their bedroom, search their belongings,

download their computer, even intercept their phone conversations while they were staying in a hotel on vacation. But that is not all: The government then capitalized on this unchecked surveillance authority by intercepting several privileged communications between Squillacote (or her husband) and Squillacote's psychotherapists — and (so it appears) thereafter used that privileged information to develop a psychological profile on Squillacote in order to "exploit" her psychiatric infirmities in an undercover operation. And once the case got to trial, the government successfully prevailed upon the district court to instruct the jury that it did not matter, for purposes of the espionage statutes, that the information contained in classified documents passed by Squillacote to an undercover agent was already in the public domain.

The court of appeals sustained the government's position on each of these crucial issues. Without disclosing its reasoning or affording defense counsel an opportunity to see the government's FISA applications, the court held that there was sufficient probable cause to conduct the 550-day surveillance. Without seriously reckoning with a line of conflicting circuit decisions, it held that a breach of the psychotherapist-patient privilege — because it is not constitutionally rooted — does not require the government to show that its evidence was independently derived. And in a flat repudiation of well-settled espionage case law, the court below held that information is "related to the national defense" even if it is widely and readily available to the public. For each of these reasons, the petition for a writ of certiorari should be granted.

1. Petitioners Squillacote and Stand are a married couple who lived with their two young children in the District of Columbia from the early 1980s to October 1997. During the 1980s, Ms. Squillacote worked as an attorney for the National Labor Relations Board, and in 1991 began work as a lawyer at the Department of Defense, where she held a security clearance. See Pet. App. 4a. Stand held a number of jobs in the private

sector throughout the 1980s and in the 1990s (including most recently as a labor union representative (see Pet. App. 110a)); he has never held a position with a security clearance. Court of Appeals Joint Appendix ("JA") 430.

In October 1997, Squillacote and Stand (along with a friend of the couple, James Clark) were arrested for conspiracy to commit espionage. Their arrest was the culmination of an extensive FBI investigation spanning several years. That investigation began some time after the fall of East Germany, when the United States made a cash payment to an undisclosed source in exchange for records that ostensibly came from the former East German intelligence service and contained the names of the two defendants. JA421. After massive surveillance by the FBI unearthed no evidence that defendants had ever passed classified information (JA2089), the government (in approximately January 1996) obtained the first of 20 separate authorizations to conduct clandestine surveillance of defendants' residence pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801, *et seq.*, see Pet. App. 7a.

The government conducted electronic surveillance lasting some 550 consecutive days. See Pet. App. 11a. During this electronic surveillance, the government intercepted (and in at least two instances transcribed) telephone conversations between Squillacote (or her husband) and Squillacote's psychotherapists. See Pet. App. 22a; see also Pet. App. 119a-128a. The government also conducted two secret physical searches of defendants' home pursuant to FISA.

2. Despite the voluminous information collected through the FISA wiretaps and physical searches, by the summer of 1996 the government still had no evidence that Squillacote or Stand ever passed classified materials. JA2089; see also Pet. App. 10a. Accordingly, the government set about creating a psychological profile of Squillacote in order to develop a sting

operation against her. Pet. App. 108a-118a. The Behavioral Analysis Program team — a special unit of psychologist(s) and FBI agents that develops psychological assessments of individuals — prepared a profile that described, with remarkable precision, Squillacote's unique psychiatric vulnerabilities. Capitalizing on the government's hundreds of hours of taped surveillance (including, apparently, of Squillacote's psychiatric sessions), the profile described Squillacote as having the "mind of a newly pubescent child" (Pet. App. 113a); reviewed her history of depression and her use of prescribed anti-depressants (Pet App. 111a); identified Squillacote's "narcissistic" and "histrionic" personality (Pet. App. 115a); and noted her "poor impulse control" (Pet App. 114a), constant need for "reassurance, approval, and praise," (Pet. App. 115a n.5), and "excessively emotional behavior." (*Ibid.*) The profile even recognized that, once arrested, Squillacote was a serious risk for suicide. See Pet. App. 113a.

Having catalogued Squillacote's psychological weaknesses, the profile then devised a "false flag" operation that was "designed to exploit her narcissistic and histrionic characteristics." Pet. App. 115a. The profile recommended swift action to exploit Squillacote's "emotional vulnerability" (Pet. App. 112a), and to ensure that the sting operation was launched while Squillacote was still working at the Pentagon (which, as the government learned, she was about to leave). JA2090. Closely adhering to the recommendations set out in the psychological profile, the government launched its false flag operation, luring Squillacote to a meeting, purportedly with an "emissary" of a South African government official to whom she had written a political letter in 1995. See Pet. App. 8a. At their initial encounter, the "emissary" — actually, an undercover agent — appealed to Squillacote's emotions and political sympathies (JA2188-89; 2199, 2204) and insisted — in the face of Squillacote's contrary expressions — that she furnish him something "we didn't have access to[.]" JA630. At the next

meeting, on January 5, 1997, Squillacote brought four classified documents from her workplace. Much if not all of the information contained in those documents was already in the public domain.

3. On February 17, 1998, a grand jury in the Eastern District of Virginia returned a five-count indictment against Squillacote and Stand, together with James Clark. Count 1 charged all three defendants with conspiring to transmit "information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and the Republic of South Africa, in violation of 18 U.S.C. § 794(c). Count 3 charged Squillacote and Stand with attempted espionage, in violation of 18 U.S.C. § 794(a). Count 4 charged Squillacote and Stand with obtaining national defense information, in violation of 18 U.S.C. § 793(b). Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. § 1001. JA82. On June 3, 1998, Clark pleaded guilty to Count 1 (and Count 2 was dismissed). JA352.

Prior to trial, petitioners moved to suppress the evidence obtained pursuant to FISA, contending that the government lacked probable cause that petitioners were "agents of a foreign power" within the meaning of FISA (see 50 U.S.C. § 1801(b)(2)(A)-(D)) at the time that FISA authorization was granted and renewed. See 50 U.S.C. §§ 1805(a)(3), 1824(a)(3). Petitioners also sought disclosure of the government's applications in support of the FISA searches and surveillance, claiming that disclosure was "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. §§ 1806(f), 1825(g). Without disclosing the government's applications — and, accordingly, without permitting a truly adversarial proceeding — the district court denied the motion in all respects, concluding (without explanation) that the government had established probable cause that petitioners were "agents of a foreign power" at all relevant times.

Petitioner Squillacote also moved pre-trial to suppress evidence obtained through the interception of privileged psychotherapist-patient communications, as well as for a pre-trial evidentiary hearing at which the government would shoulder the "heavy burden" of establishing that its evidence had not been derived from such privileged communications. See Pet. App. 23a. The court denied Squillacote's motion, holding that a "taint analysis" was not required because the communications were not protected by "a constitutionally-based privilege." Pet. App. 23a.

4. Petitioners presented two principal lines of defense at trial. First, they contended that they were entrapped by the government's actions — Squillacote directly, and Stand "derivatively." In support of that defense, petitioners presented the testimony of two forensic psychiatrists (one from John Hopkins and the other from the Austen-Riggs Center in Stockbridge, Massachusetts), as well as Squillacote's treating psychiatrist at the time of the sting operation. Taken together, these experts testified that Squillacote suffered from clinical depression and borderline personality disorder, and that the government's sting operation had successfully exploited her unique psychiatric infirmities. JA1014-1583.[1]

Second, petitioners contended that the government did not carry its burden of proving that the four documents Squillacote passed to the undercover agent contained "information relating to the national defense" — an element of the espionage statutes.

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[1] One of the expert psychiatrists testified that Squillacote's personality disorder likely had its roots in the significant childhood trauma that she experienced as a result of numerous painful surgeries and protracted hospitalizations to correct severe physical deformities, including a missing right leg (below the knee), a clubbed left foot, and the absence of fingers on one hand. JA1503-11. The psychiatrist testified that this type of childhood trauma (which often occasions extended separation from parents and isolation) is highly associated with borderline or "Cluster B" personality disorders. JA1155-1156.

See 18 U.S.C. §§ 793 and 794. In light of the failure of the government's witnesses to ascertain whether the same information was present in publicly available sources — and in light of the fact that much (if not all) of the information was *in fact* contained in publicly available sources — petitioners asserted that this critical element of the espionage charges had not been proved. JA1426. Over petitioner's objections, however, the district court instructed the jury "that information is related to the national defense when the government makes efforts to guard the information, regardless of the public's accessibility to the information." JA2398.

After three days of jury deliberations, defendants were convicted on all counts. Petitioner Squillacote was sentenced to a period of incarceration of nearly 22 years, and petitioner Stand was sentenced to more than 17 years in prison.

5. The court of appeals affirmed. See Pet. App. 1a-66a. The court rejected petitioners' claim that the district court should have ordered disclosure of the government's FISA applications, holding that "because the documents submitted by the government were sufficient for the district court to determine the legality of the surveillance, we * * * deny the Appellant's request for disclosure under FISA." Pet. App. 15a. Thus deprived of any meaningful input from the defense, the court of appeals went on to review the government's FISA applications *ex parte* and *in camera*, and concluded — again without explanation — that "each FISA application established probable cause to believe that Squillacote and Stand were agents of a foreign power." Pet. App. 14a.

The court of appeals next held that the district court properly refused to hold a hearing to determine whether the government had derived any of its evidence from petitioners' privileged psychotherapist communications. The court explained that: "[W]e do not believe that suppression of any evidence derived from the privileged conversations would be

proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.

Finally, the court sustained the district court's instruction on the definition of "information relating to the national defense." Pet. App. 57a. The court did not dispute the fact that the government had never even sought to prove that the "information" at issue was outside the public domain. Indeed, the court recognized that petitioners had "presented evidence of the public availability of information similar to some of the information contained in the documents passed by Squillacote to the undercover agent." Pet. App. 58a. And the court acknowledged that the instruction given by the trial court effectively "prevented the jury from properly considering" this line of defense. Pet. App. 58a. Nevertheless, the court of appeals approved the instruction. In its view, this Court's decision in *Gorin* v. *United States*, 312 U.S. 19 (1941), and Judge Learned Hand's opinion for the Second Circuit in *United States* v. *Heine*, 151 F.2d 813 (1945), make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions.*" Pet. App. 61a (emphasis added). "Under this analysis," the court continued, "the instructions given by the district court in this case were clearly correct, and properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE GOVERNMENT IS NOT PROHIBITED FROM MAKING DERIVATIVE USE OF INFORMATION PROTECTED BY NON-CONSTITUTIONAL TESTIMONIAL PRIVILEGES SUCH AS THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

During the government's electronic surveillance of defendants' home under the auspices of FISA, defendant Squillacote was under the care of a psychologist and psychiatrist for severe depression. On several occasions, Squillacote's psychotherapists provided consultation and treatment over the telephone to Squillacote, both directly and indirectly (through her husband). As noted above, on at least eight occasions those conversations were intercepted by the government, and on two occasions they were transcribed and reviewed by government agents. See JA2173-80; Pet. App. 119a-128a. The transcribed conversations included highly sensitive, personal information about Squillacote's mental condition and her family's medical history, including Squillacote's mother's tendency toward depression and Squillacote's recent suicidal ideations. See JA2173-80. Some of the information conveyed by Squillacote (and her husband) to Squillacote's psychotherapists found its way into the Behavioral Analysis Program profile ("BAP") — which, as explained above, was the psychological blueprint for the government's undercover operation against Squillacote. Pet. App. 111a, 119a-128a. In addition, a government agent who listened to Squillacote's (and her husband's) privileged conversations with Squillacote's psychotherapists completed a diagnostic questionnaire that was relied upon in preparing the BAP. JA356-357 (Declaration of Thomas M. Chemlovski).

Nevertheless, the court of appeals held that Squillacote was not entitled to a hearing at which the government must bear the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *United States* v. *Harris*, 973 F.2d 333, 336 (4th Cir. 1992) (citing *Kastigar* v. *United States*, 406 U.S. 441 (1972)). The court agreed that the intercepted conversations were privileged; but it held that "because the privilege here at issue is not a constitutional one, the district court properly refused to suppress any evidence arguably derived from the government's interception of" Squillacote's privileged communications with her psychotherapists. Pet. App. 27a.

A. The Circuits Are Divided Over Whether The Government Is Permitted To Make Derivative Use Of Information Protected By Non-Constitutional Testimonial Privileges

The Fourth Circuit's holding deepens an already pervasive conflict in the courts of appeal over whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege.

Like the Fourth Circuit, the Ninth and Tenth Circuits permit the derivative use of information protected by a common-law testimonial privilege. See *Nickel* v. *Hannigan*, 97 F.3d 403, 408-409 (10th Cir. 1996) (declining to apply "the fruit of the poisonous tree" doctrine to the possible breach of attorney-client privilege, and holding that "any breach of [defendant's] attorney-client privilege that [his lawyer] may have committed had no effect on the admissibility" of evidence purportedly derived from privileged information); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir. 1980) ("[b]ecause we reject * * * Lefkowitz's argument that the marital privileges are somehow constitutionally grounded in, among other locations, the Fourth Amendment, we doubt that a secondary source of information obtained through information

protected by the confidential marital communications privilege would in any way be 'tainted'"); *United States* v. *Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) ("no court has ever applied ['the fruits of the poisonous tree'] theory to any evidentiary privilege" and adding that Ninth Circuit "would not be the first to do so").

By contrast, the Second, Third, and Seventh Circuits have held that the government is prohibited from making both direct and derivative use of information protected by testimonial evidentiary privileges. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997) (because the government promised that neither witness's testimony nor its fruits would be used to prosecute witness's husband, the Third Circuit affirmed the district court's contempt order; held, such "use-fruits" immunity ensured that witness's testimony "will not have adverse legal consequences to her spouse," and thus "the purpose of the privilege is in no way undermined"); *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege); *United States* v. *Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989) (ordering the district court to hold "an evidentiary hearing to determine whether the government's case was in any respect derived from a violation of the attorney-client privilege"); *In Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985) (sustaining contempt order against a witness who refused to provide grand jury testimony where the government promised to make no direct or indirect use of her testimony in any criminal investigation of her husband; held, the "'*use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse*

spousal testimony");[2] *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992) (where government is complicit in obtaining information protected by the common law attorney-client privilege (*i.e.*, attorney-client communications that occur prior to the attachment of a defendant's Sixth Amendment right to counsel), court should consider "whether evidence that the government introduced to convict" defendants "stem[med] directly or indirectly" from privileged information).[3]

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[2] The Fourth Circuit attempted to distinguish the decisions from the Second and Third Circuits involving the adverse spousal testimony privilege on the ground that those cases involved the "government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. But that is truly a distinction without a difference. Each of those cases plainly held that a right against *derivative use* was part and parcel of the underlying common-law privilege. That is why it would not have been sufficient, in *Ford*, for example, for the government to promise merely not to *directly* use the spouse's testimony. Rather, the court held that "'use-fruits' immunity is * * * is fully co-extensive" with the testimonial privilege. *Ford*, 756 F.2d at 255.

[3] Not surprisingly, the district courts are also in disarray on the question whether the violation of a common-law non-constitutional privilege requires a hearing to ensure that the government's evidence at trial has not been derived from privileged material. Compare *United States* v. *Longo*, 70 F. Supp.2d 225, 264 (W.D.N.Y. 1999) (in case involving alleged breach of attorney-client privilege by government before indictment, court held that "[w]here a violation of the attorney-client privilege is demonstrated, the remedy for such a violation is the suppression of evidence derived from the privileged communication[]"); *United States* v. *Weissman*, No. 52 94 Cr. 760 (CSH), 1996 WL 751386, at *8 (S.D.N.Y. Dec. 26, 1996) (after government mistakenly received interview notes protected by attorney-client privilege during its investigation of defendant, government was required to satisfy "heavy burden" that its evidence against defendant was "derived from legitimate independent sources of proof, rather than from the direct or indirect use of privileged information"); *United States* v. *Boffa*, 513 F. Supp. 517, 522-523 (D. Del. 1981) (although "there are no constitutional principles which are in need of vindication" since "the alleged governmental intrusion into the defendants' attorney-client relationships * * * occurred long before * * * their Sixth Amendment right to assistance of counsel had attached," if defendant can establish breach of common-law attorney-client privilege, government would be required to establish that "its proof at trial had an

B. Whether The Government Is Prohibited From Making Derivative Use Of Information Protected By A Testimonial Common Law Privilege — Such As The Psychotherapist-Patient Privilege — Is An Important And Recurring Federal Question

Whether the government may electronically intercept (or otherwise acquire) the contents of privileged psychotherapist-patient communications and then use the information contained in those conversations to build a criminal prosecution is a question of surpassing importance in the development of federal criminal law. The very premise of common-law privileges is that frank and candid communications (whether with a psychiatrist, a lawyer, or a spouse) "depend[] upon an atmosphere of confidence and trust" (*Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996)). The question whether the protection against derivative use is limited only to information shielded from disclosure by a "constitutionally-based privilege" has profound implications for a broad range of citizens' everyday conduct.

Law enforcement, too, has the right to expect (and the need for) clear guidance from the Court concerning the constraints (if any) on its ability to make indirect use of privileged communications — as the government apparently did in this case. Where it is clear to law enforcement officers that they are not permitted to derive evidence from privileged information — such as after Fifth Amendment immunity has been conferred on a witness who is under investigation — they have become quite accustomed to taking appropriate steps to segregate the privileged information from the remainder of the investigation to safeguard against any impermissible taint. See, *e.g.*, *United States* v. *Lacey*, 86 F.3d 956, 972 (10th Cir. 1996) (no *Kastigar*

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independent origin, untainted" by the privileged information) with *SEC* v. *OKC Corp.*, 474 F. Supp. 1031, 1039 (N.D. Tex. 1979) (rejecting application of "fruit of the poisonous tree doctrine" to evidence derived from information protected by attorney-client privilege).

hearing necessary because government "erect[ed] a so-called 'Chinese Wall' between those persons exposed to [defendant's] grand jury testimony and those who were not."). Indeed, certain components of the government have established "Chinese Wall" and "taint team" procedures to deal with situations in which even common-law privileged information has been intercepted. See, *e.g.*, *United States* v. *Neill*, 952 F. Supp. 834, 840-841 (D.D.C. 1997) ("taint team" established to review materials protected by attorney-client privilege); *United States* v. *Burnett*, No. 95-CR-272 (JG), 1996 WL 1057161, at *6 n.6 (E.D.N.Y. March 11, 1996) ("Chinese Wall" erected to review attorney-client privileged material).

By contrast, in other cases involving the government's acquisition of privileged material (including this one), little has been done by the government to minimize the risk that the privileged material might taint the development of evidence to be used in the prosecution. See, *e.g.*, *Weissman*, 1996 WL 751386, at *12 n.5 (government did not erect "Chinese Wall" to protect against possible taint from attorney-client privileged information). The Court should take this occasion to provide a uniform answer to this important and recurring area of federal criminal law — by making clear that derivative use of even common-law privileged material is forbidden.

II. THE COURT OF APPEALS' CONSTRUCTION OF THE TERM "RELATING TO THE NATIONAL DEFENSE" IS INCONSISTENT WITH THIS COURT'S CASE LAW AND WORKS AN UNJUSTIFIED EXPANSION OF THE REACH OF THE ESPIONAGE STATUTES

To prove all but the false statement count in this case, the government was required to establish beyond a reasonable doubt that the defendants obtained, attempted to transmit, or conspired to transmit information "relat[ed] to the national defense." See 18 U.S.C. §§ 793(b), 794(a) and (c). The very

heart of the defense case on this essential element was that the government had failed to prove that the information on which the government relied was *not lawfully available in the public domain*. To this end, petitioners established that the government had not conducted any inquiry to determine if the information was available to the public before January 5, 1997 (the date of dissemination). And, as if it were their burden of proof (not the government's), petitioners also showed the jury an array of publicly available documents that contained precisely the same information that the government relied upon to prove the espionage-related charges.

Remarkably, the district court stripped petitioners of their ability to present this defense by instructing the jury, in effect, that it was no defense at all. The jury was told that, to establish the element of relating to the national defense, the government need prove only "two things":

> . . . First, it must prove that the disclosure of the material would be damaging to the United States or might be useful to an enemy of the United States.
>
> And second, it must prove that the material is closely held by the United States Government.

JA1435; Pet. App. 58a. Over strenuous objection, the court declined to instruct the jury that the government also had to prove that the information was not lawfully available to the general public. The court of appeals sustained the district court's instruction, holding that this Court's decision in *Gorin* v. *United States*, *supra*, and Judge Learned Hand's opinion in *United States* v. *Heine*, *supra*, make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions.*" Pet. App. 61a (emphasis added).

In fact, however, *Gorin* and *Heine* provide cold comfort for the court of appeals' unprecedented construction of the term "relating to the national defense." By holding, in substance,

that information — no matter how freely available to the public — nevertheless relates to the national defense unless *the government* releases it, the court below wrenched the phrase from its statutory context and worked an unjustified expansion of the espionage statutes. Further review is plainly warranted.

A. *Gorin* and *Heine* Do Not Support — If Anything, They Contradict — The Court of Appeals' Construction

In *Gorin*, this Court held that the categories of "information" covered by the Espionage Act must be construed in the context of "[t]he obvious delimiting words in the statute," which required the government to prove "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." 312 U.S. at 27-28 (internal quotation omitted). This language, the Court reasoned, "requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established." *Id.* at 28. And, coming to the heart of the matter, the Court explained:

> Where there is no occasion for secrecy, *as* with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.

Ibid. (emphasis added).

"When there is no occasion for secrecy," the Court held, the "information" at issue cannot give rise to espionage. True enough, when the government itself has released the information to the public, there is no longer any "occasion for secrecy." But the Court quite plainly did *not* hold that it is *only* when the government itself releases the information that "there is no occasion for secrecy." That is why the Court used the critical, if diminutive, word "as" (and why we highlighted the

term in the previous quotation). As the Court made clear, the central question is whether there is an "occasion for secrecy"; if there is not — either because the government has relinquished the information or because the information has, by some other means, become widely disseminated to the public — there simply cannot be the requisite inference of scienter, and thus the information does not "relate" to the national defense.

The Second Circuit's decision in *United States* v. *Heine*, 151 F.2d 813 (1945), reinforces the point. The defendant in that case culled all of the information he sent abroad from publicly available sources, and he contended on appeal that such information cannot give rise to an espionage prosecution. The court of appeals agreed. The court did, to be sure, observe that the government had "never thought it necessary to withhold" the information at issue. 151 F.2d at 816. But, as in *Gorin*, there was no intimation that it is *only* the government's decision-making that distinguishes information that does, and does not, relate to the national defense. If anything, the case suggests quite the opposite. In explaining why Heine's efforts to arrange the material in a useful manner did not render him culpable under the statute, the court of appeals, relying on *Gorin*, explained that "when the information has once been made public, and has thus become available *in one way or another to any foreign government*, the 'advantage' intended by the section cannot reside in facilitating its use by condensing and arranging it." *Id.* at 817 (emphasis added).

The court below read *Gorin* and *Heine* to mean that "the central issue is the secrecy of the information, which is determined by the government's actions." Pet. App. 61a. That is half right. "The central issue" is, indeed, "the secrecy of the information." But neither *Gorin* nor *Heine* can be fairly read to hold that *only* "the government's actions" can "determine" whether information is secret. If anything, the cases suggest exactly the opposite.

B. The Court of Appeals' Decision Works A Radical Change In Well-Settled Espionage Law

Until this case, no one would have guessed that the public availability of information was irrelevant to whether it "relates to the national defense." Indeed, the standard text on federal jury instructions — 1 Sand, Siefert, Loughlin & Reiss, MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.091, at 29-5 (1997) — states in relevant part:

> Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section.

See also JA1645 (Defendants' Alternate Jury Instruction). Even the Fourth Circuit had consistently taken that view. See *United States* v. *Morison*, 844 F.2d 1057, 1071-1072 (4th Cir. 1988) ("the government must prove that the documents * * * are closely held in that they have not been made public *and* are not available to the general public") (emphasis added); *United States* v. *Truong*, 629 F.2d 908, 918, n.9 (4th Cir. 1980) (approving instruction that informed the jury "that the defendants would not be guilty of transmitting national defense information if the information were available in the public domain" — that is to say, the district court "specifically instructed the jury that transmission of publicly available information did not fall within the statutory prohibitions").[4]

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[4] See also, *e.g.*, 70 AM. JUR. 2D SEDITION, SUBVERSIVE ACTIVITIES, AND TREASON § 35 (1987) ("One cannot be convicted of violating the Espionage Act if the information transmitted was made available to the public by the government, *or* if the information was available to everyone from lawfully accessible sources, *or* if the government did not attempt to restrict its dissemination.") (emphasis added); *id.* § 43 ("The jury should be specifically instructed that the transmission of publicly available information does not fall within the statutory prohibitions.") (citing *Truong*); *United States* v. *Richardson*, 33 M.J. 127, 129 (C.M.A. 1991) (noting that, under the espionage statute governing military members, which "tracks the language

So well-established was this rule that **both** the government and the defendants requested that the jury be instructed that "[o]nly information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section." JA1645 (Defendants' Alternative Jury Instruction); see JA1483 (Government's Proposed Jury Instruction No. 10) ("[The Government must prove that the material is closely held in that it has not been made public by the United States Government *and* is not available to the general public.") (emphasis added). At trial, however, petitioners were able to show that, while the documents in question had not been declassified, information contained within them was lawfully available to the general public from other sources, such as *Jane's Intelligence Review* and *Jane's International Defense Review*. JA 794-815, 872-965, 1648-1650, Defense Exhibits ("DE") 205-215. This showing caused the government to withdraw its proposed instruction and replace it with the charge ultimately given by the district court. JA1534 (Government's Revised Jury Instruction No. 10).[5]

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of 18 U.S.C. § 794(a)," a defendant may be convicted only if he or she transferred "information that is not lawfully accessible to the public").

[5] Notably, the government has, in other forums, embraced petitioners' view of the law. See Hearings on the Peter Lee Case Before the Subcomm. on Administrative Oversight and The Courts of the Senate Committee on the Judiciary, 106th Cong. (2000), available in LEXIS, FDCH Political Transcription, April 12, 2000 ("Hearings"). In explaining his concerns about the viability of a prosecution under 18 U.S.C. § 794, Department of Justice prosecutor Michael Liebman (one of the prosecutors in this case) explained to a subcommittee of the Senate Judiciary Committee that "even though the Department of Defense may in good faith and in full propriety classify a document or classify certain documents, if in fact, the information is not significant, *if in fact, there is substantially the same information available to the public, then it is not national defense information and therefore not a violation of those provisions*." Hearings at 28 (emphasis added).

Under the court of appeals' construction, any defense information — no matter how widely and readily available — "relates" to the national defense unless and until the government officially releases it. Not only does this violate the baseline presumption that criminal statutes be narrowly construed (see *Cleveland* v. *United States*, ___ U.S. ___, 121 S. Ct. 365, 373 (2000)), but it also works a troubling and unjustified expansion of the espionage law in particular. As this Court explained in *Gorin*, the espionage statutes must not be construed to "force[] anyone, at his peril, to speculate as to whether certain actions violated the statute." 312 U.S. at 26. But the court below has done just that. The most widely available information may now give rise to an espionage prosecution, so long as the government was not the original disseminator. That is a considerable risk — and raises profound First Amendment concerns — since it will not always be easy to tell the original source of a leak, and since the government does not invariably acknowledge its own role in leaking information. *Cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe [a] protected freedom").

The court of appeals sought to justify its newly-minted construction of the espionage statutes by explaining that information from non-government sources can *never* be equivalent to the information contained in a government document because the former lacks the authoritativeness inherent in classified government material. See Pet. App. 63a. That is doubtless true in many cases. By the same token, however, there are certainly occasions (as in this case) in which the *fact* that a piece of information is in a government document carries no special significance and thus the public disclosure of that information by non-governmental sources can be said to constitute the same "information." For example, the government would be hard-pressed to persuade a jury that a

classified report of an arms transfer between two foreign nations carries some special imprimatur that makes it more valuable than the public announcement by the foreign governments themselves that the arms deal has been consummated. And such classified information becomes even more obsolete after public reports of the actual delivery of those weapons systems.[6] The bottom line is that the question of whether any particular piece of information in a classified document provides "information" above and beyond the content itself is an intensely fact-intensive one for the jury to decide. Here, the jury was not even given the opportunity to consider the issue. By sustaining the jury instructions in this case — which made *absolutely no mention* of the fact "that transmission of publicly available information d[oes] not fall within the statutory prohibitions," *Truong*, 629 F.2d at 918 n.9 — the court below held that there is *always*, as a matter of law, an imprimatur associated with government documents.

III. THIS COURT SHOULD REVIEW THE GOVERNMENT'S PURPORTED SHOWING OF PROBABLE CAUSE TO CONDUCT FISA SURVEILLANCE, AS WELL AS CLARIFY WHEN, IF EVER, DEFENSE COUNSEL SHOULD BE PERMITTED TO EXAMINE THE APPLICATIONS THAT SUPPOSEDLY SET FORTH THE REQUIRED PROBABLE CAUSE

Petitioners were the targets of 550 consecutive days of electronic surveillance and physical searches authorized by federal judges under FISA. This blanket surveillance — which included microphones embedded in petitioners' home and bedroom, telephone intercepts, and at least three clandestine

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[6] This was precisely the type of classified and publicly available information at issue in this case. See, *e.g.*, Government Trial Exhibit ("GE") 4 [classified document]; Defendants' Trial Exhibit [publicly available materials].

physical intrusions into petitioners' residence — was authorized and extended on at least 20 different occasions during the 550 day period. See Pet. App. 11a, 14a. Under FISA, a judge of the Foreign Intelligence Surveillance Court ("FISC") — consisting of seven district court judges appointed by the Chief Justice — could have authorized each surveillance only upon a finding of "probable cause" that petitioners were, at the time of each application, "agents of a foreign power" or knowingly conspiring with or aiding and abetting an "agent of a foreign power." 50 U.S.C. § 1801(b)(2)(A), (D).[7]

The court of appeals sustained the "probable cause" finding (Pet. App. 15a), after determining — based on its own *ex parte* and *in camera* review of the FISA materials — that FISA's probable cause standard was met. Pet. App. 14a. It also sustained the trial court's refusal to allow defense counsel to examine the applications that ostensibly showed the requisite probable cause. See Pet. App. 15a.

We believe both holdings are deeply mistaken and ask the Court to review them.[8]

1. With respect to the refusal to let defense counsel even examine the government's showing of probable cause, that is, to say the least, a striking anomaly in federal criminal law. In general, a warrant must issue before the government can conduct either an electronic surveillance or physical search of a residence. U.S. CONST., AMEND. IV; 18 U.S.C. §§ 2511, 2518, 2236; *United States* v. *Karo*, 468 U.S. 705, 714-15

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[7] FISA permits a FISC judge to order surveillance only upon a finding "on the basis of the facts submitted by the [government] applicant [that] there is probable cause to believe that (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . ." 50 U.S.C. § 1805(a)(3); *see also* 50 U.S.C. § 1824(a)(3) (addressing physical searches).

[8] Petitioners have requested the Department of Justice to forward the government's FISA applications to the Court. Pet. App. 129a-130a.

(1984). Indeed, absent unusual circumstances, physical searches of a private home are generally to be announced and in the presence of the owner. *Richards* v. *Wisconsin*, 520 U.S. 385, 389 (1997). Moreover, in virtually all other warrant circumstances, the government's application for a warrant is either a matter of public record, or at least must be disclosed to provide the defendant with an opportunity to suppress any fruits of the surveillance. See, *e.g.*, 18 U.S.C. § 2518(9) (Title III) and FED. R. CRIM. P. 41(g). Under FISA, however, the underlying FISA applications remain presumptively secret, only to be disclosed where "necessary to make an accurate determination of the legality" of the search or surveillance. 50 U.S.C. § 1806(f), 1825(g). There are no reported cases in which any Court has authorized such a disclosure.[9]

In this case, the courts denied petitioners access to each of the FISA applications and affidavits (see Pet. App. 15a), forcing petitioners to mount a virtually blind "probable cause" challenge to those surveillance and search orders. As a result, the only judicial evaluations of the legality of the 20 FISA orders occurred *in camera* and *ex parte*, without any adversarial proceeding.[10] The courts did not articulate the bases for their findings that no disclosure was "necessary to make an accurate

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[9] It appears that only one circuit court has addressed the due process consequences of FISA's non-disclosure provision. See *United States* v. *Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (finding no due process violation). Other courts have simply applied the *in camera* and *ex parte* review procedures without addressing any due process objections. See, *e.g.*, *United States* v. *Johnson*, 952 F.2d 565, 571-72 (1st Cir. 1991); *United States* v. *Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987) (denying request for disclosure of FISA application).

[10] In enacting FISA, Congress intended that the issue of probable cause be guided by "the same requisite elements which govern such determinations in the traditional criminal context." S. Rep. No. 95-604, at 47 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3948-49. In *Ornelas* v. *United States*, this Court held that "as a general matter determinations of . . . probable cause should be reviewed *de novo*." 517 U.S. 690, 699 (1996).

determination of the legality" of the surveillance, as required under the statute.

There was no legitimate justification for the courts to undercut petitioners' ability to mount a probable cause challenge to the massive FISA surveillance deployed against them by denying them access to the FISA applications and affidavits. FISA specifically provides that targets of FISA surveillance may move to suppress "evidence obtained or derived from such * * * surveillance," on the grounds that either the evidence was "unlawfully acquired" or that "the surveillance was not made in conformity with an order of authorization or approval." 50 U.S.C. §§ 1806(e) and 1825(f). Furthermore, while FISA permits the court to deny disclosure where the Attorney General certifies that "disclosure or an adversary hearing would harm the national security of the United States" (50 U.S.C. §§ 1806(f), 1825(g)), FISA's legislative history indicates that Congress intended that disclosure would "typically" be given where the court's initial review of the application, order and fruits of surveillance indicates that the question of legality may be complicated by factors such as "'indications of possible misrepresentation of fact.'" *United States* v. *Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) (quoting S. Rep. 95-701, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 3960).

Here, petitioners adduced substantial evidence that the government could not have met its probable cause showing in some or all of its FISA surveillance applications, raising serious questions regarding the lawfulness of the surveillance and the accuracy of the representations the government made to the FISA judges. Yet, the courts made their probable cause evaluations in a vacuum, using secret evidence never revealed to the petitioners, despite their *prima facie* probable cause challenge. This Court has never examined the lawfulness of this FISA provision, which permits sweeping invasions of privacy against United States citizens and then permits the

government and the courts to deny defendants access to the applications and affidavits that purported to establish the probable cause basis in the first place. Without adequate guidelines for reviewing courts to follow when making their *de novo* probable cause determinations, defendants cannot possibly bring meaningful probable cause challenges.

2. This Court also should examine the sufficiency of the probable cause showings in this case. To be sure, in the usual case, the sufficiency of probable cause is a fact-bound question unworthy of the Court's review. But this hardly is "the usual case." Absent the Court's review, coupled with a truly adversarial proceeding, petitioners will never have a full and fair chance to contest the merits of this extraordinary surveillance.

FISA does not permit secret surveillance based on a *past* relationship with a foreign power, but instead authorizes surveillance only where there is probable cause to believe the target is in an *ongoing* agency relationship with a foreign power. 50 U.S.C. §§ 1805(a)(3), 1801(b).[11] In this case, the government has contended that surveillance was justified under FISA's "aiding and abetting" or "conspiracy" provision (50 U.S.C. § 1801(b)(2)(D)), yet this provision also requires a knowing, *present* agency relationship with a foreign power.[12]

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[11] To be an "agent of a foreign power" requires, at a minimum, the knowing performance of activities for or on behalf of a foreign power sufficient to meet traditional standards of agency law. *See* S. Rep. 95-604, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 3923.

[12] In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). Likewise, "in a conspiracy two different types of intent are generally required — the basic intent to agree * * * and the more traditional intent to effectuate the object of the conspiracy." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). Thus, under

The Russian Federation is the only "foreign power" in this case with which petitioners could have had an "agency" relationship during the 550 days of FISA surveillance.[13]

Accordingly, each of the 20 FISA applications has to be evaluated, *de novo*, to determine whether there is probable cause to believe that petitioners were, at the time of each application (see *Sgro* v. *United States*, 287 U.S. 206, 210 (1932)), either an "agent" of the Russian Federation, or knowingly aiding and abetting (or conspiring with) an agent of the Russian Federation. In its opinion, the court of appeals held: "We have reviewed *de novo* the relevant materials, and likewise concluded that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a.

Section 1801(b)(2)(D), the government was required to establish in its FISA applications that petitioners knowingly were conspiring or assisting an "agent or a foreign power" with the specific intent to engage in "clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." See 50 U.S.C. § 1801(b)(2)(A).

[13] The indictment identified only four possible "foreign powers": East Germany, the Soviet Union, South Africa, and the Russian Federation. See JA86. East Germany and the Soviet Union, of course, ceased to exist in 1990, well before the FISA surveillance at issue here, and any prior agency relationship petitioners may have had with these defunct nations could not have satisfied FISA's strict surveillance mandates in 1996 and 1997. The government has never argued that petitioners were in any agency relationship with South Africa at the time the FISA surveillance commenced. Indeed, the predicate for the "false flag" operation — initiated during the FISA surveillance — was for a U.S. government agent to pose as a South African intelligence officer seeking to *initiate* an agency relationship with petitioners on behalf of that nation. See Pet. App. 115a-116a. That leaves the Russian Federation as the only possible "foreign power" for which petitioners could have been "agents" during the FISA surveillance; but there was no probable cause to believe such a relationship with Russia actually existed.

Yet, the court of appeals declined to provide any details to support its conclusion, stating it was relying *solely* on its *ex parte* and *in camera* review of the FISA applications and finding no error in the exclusion of petitioners from this secret examination. Pet. App. 14a-15a.

In making its own *de novo* assessment of the FISA applications, see *Ornelas* v. *United States*, 517 U.S. at 698 (probable cause determinations should be reviewed *de novo*), this Court should consider the following issues, among others, with respect to the initial FISA application in early 1996:

First, did the government inform the FISC judge that it was proceeding under FISA's "aiding and abetting" and "conspiring" provision and did it show that petitioners — as the target of the surveillance — were *knowingly* conspiring with or *knowingly* aiding and abetting or conspiring with an "agent of a foreign power" who had an *existing* agency relationship with a foreign power?

Second, if the government claimed that petitioners were "aiding and abetting" or "conspiring" with Lothar Ziemer — their supposed former East German "handler" — did the government claim that Ziemer had an ongoing agency relationship with the Russian Federation, and if so, could that claim have supported a probable cause finding in 1996 given that (a) Ziemer had been arrested in Germany in 1992 and convicted in 1995 for intelligence gathering activities,[14] and (b) the FBI had interviewed him and offered him immunity from prosecution in 1992?

And *third*, even if the government adduced evidence sufficient to establish that Ziemer was acting as an agent of Russia in 1996, did the government adduce evidence sufficient

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[14] It defies common sense to believe that the Russian Federation or any other foreign power would entrust Ziemer to perform intelligence activities on its behalf *after* his public arrest and conviction.

to establish probable cause that petitioners knew of that relationship and conspired with or *knowingly* were assisting Ziemer in his agency relationship with Russia?[15]

The same probable cause standard applies to each of the 19 subsequent FISA applications, whether they were for renewals of the initial electronic surveillance applications or whether they were for the three physical searches of petitioners' domicile in Washington, D.C.[16] With each subsequent application, the government should have brought to the attention of the FISC any new evidence that would have undercut the probable cause to believe that the petitioners were still agents of any foreign power or knowingly conspiring with or aiding and abetting agents of any foreign power. From the limited evidence made available to petitioners through discovery, several factors would have removed any probable cause during the course of the FISA surveillance:

For instance, the government learned during their FISA surveillance that Squillacote had been engaged in a romantic affair with Ziemer and that their relationship *ended* in May 1996, See Pet. App. 111a, leaving her sobbing and depressed. To the extent that the government previously had relied on some ongoing connection between petitioners and Ziemer to justify earlier surveillance orders, the clear break-up between Squillacote and Ziemer in the early months of the FISA

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[15] The mere fact that petitioners had some continuing association with Ziemer, a former East German intelligence officer, is not sufficient to establish agency, conspiracy or aiding and abetting under FISA. Indeed, Congress specifically stated that secret surveillance under FISA is not justified based on "mere continued association and consultation with" agents of a foreign power. S. Rep. No. 95-701, at 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3997.

[16] FISA authorizes surveillance against targets that are not themselves "foreign powers" only for periods of 90 days or less, and physical searches against such targets only for periods of 45 days or less. 50 U.S.C. §§ 1805(d), 1824(c).

surveillance was powerful evidence that no agency or other relationship existed after that date.

Similarly, when he government launched its "false flag" operation against Squillacote in mid-1996, it sought to capitalize on the fact that she had "end[ed] her affair with Ziemer" and thus was "emotional[ly] vulnerab[le]" to an approach by someone posing to be a member of the South African intelligence agency. Pet. App. 12a. Thus, the government sought and obtained Justice Department approval to launch its false flag operation based on the government's fervent belief that Squillacote (and her husband) *were not* at that time acting as agents of a foreign power nor were they knowingly assisting or conspiring with any such agent, but craved to embark on such a relationship with a willing patron. This demonstrates that the government knew, no later than the summer of 1996 (early on in the FISA surveillance), that petitioners were not acting as an agent of any foreign power. At a minimum, it certainly tends to negate probable cause that petitioners were acting as "agents of a foreign power." Had this information been properly disclosed to the FISC judges during that period, authorization could not have been granted.

Some or all of the 20 FISA orders, therefore, were unlawfully issued and the evidence gathered as a result of those orders should have been suppressed. Petitioners urge the Court to grant certiorari and to articulate and apply the appropriate "probable cause" standard required by due process and provided for under FISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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